Supreme Court, U. S.
FILED
JUN 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

——Consolidated With——

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF APPELLANTS

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On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF APPELLANTS

DECISIONS AND OPINIONS BELOW

The opinion and order of the U.S. Court of Appeals for the 7th Circuit was rendered on December 9, 1977. It is printed as Appendix A to Appellant's Jurisdictional Statement.

The opinions of the District Court, rendered on March 14, 1977 and April 6, 1977, are printed as Appendices B and C to appellant's Jurisdictional Statement.

The order of the District Court reflecting the agreement between appellees, Chicago Board of Election Commissioners and appellee U.S. Labor Party, signed on March 17, 1977, is printed as Appendix D to appellant's Jurisdictional Statement.

JURISDICTION

This Court noted probable jurisdiction on April 24, 1978, pursuant to U.S.C. 1254(2), in this cause from the final decision of the Circuit Court of Appeals for the Seventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State reprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 5 Of The Constitution Of The State Of Illinois, 1970

"Section 5. Board of Elections

A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State."

STATUTES INVOLVED

The State statutes involved in his appeal are 46 Ill. Rev. Stat., §§ 10-2, 10-3 and 1A-8(11). Section 1A-8(11) sets forth the supervisory authority of appellant in the administration of elections throughout Illinois. Sections 10-2 and 10-3 set forth a 5% minimum signature requirement for nomination papers for new political parties and independent candidates.

Section 10-2 provides, in part:

. . . Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. . . . if such new political party shall be formed for the entire State [the petition] shall be signed by not less than 25,000 qualified voters. . . . If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such preceding general election in such district or political

subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area . . .

Section 10-3 provides in part:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; . . . Nominations for independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political divison, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . .
>
> § 1A-8. The State Board of Elections shall exercise the following powers and perform the following duties in addition to any powers or duties otherwise provided by law.

Section 1A-8(11) provides:

> (11) Supervise the administration of the registration and election laws throughout the State.

QUESTIONS PRESENTED

Whether the Court of Appeals can negate a state statute recently held constitutional by this Court in *Jackson* v. *Ogilvie*?

Whether the Court of Appeals can ignore the principle of law mandated by this Court in *Moore* v. *Ogilvie*, that the passage of an election does not render moot substantial questions still alive for all future elections?

STATEMENT OF THE CASE

A. *History of the Proceedings*[1]

On December 20, 1976, the office of Mayor of the City of Chicago became vacant due to the death of the incumbent mayor, Richard J. Daley. This event put on notice all interested parties that a special election would be called to fill such vacancy within six months of the declaration of the vacancy by the City Council. Ch. 24, Ill. Rev. Stat., § 3-4-6.

On January 13, 1977, acting pursuant to § 3-4-6, the City Council set June 7, 1977 as the date of the special mayoral election.

On or about January 18, 1977, the Chicago Board of Election Commissioners (hereinafter "Chicago Board"), printed an Election Calendar for this election.[2]

On January 24, 1977 and January 31, 1977, Appellees commenced two separate actions in the United States District Court for the Northern District of Illinois to declare as unconstitutional those provisions of § § 10-2 and 10-3 of

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1. Citations to the Appendix of the Jurisdiction Statements will be hereinafter referred to as "J.A." Citations to the Appendix to this appeal will be hereinafter referred to as "App."

2. No longer an issue in this appeal are the allegations that the 1977 election calendar, published by the Chicago Board, was incorrect by listing different filing dates for independent candidates and new political party candidates, and by setting a higher minimum signature requirement for new political party candidates than for independent candidates. The appellant intervened and stipulated that Illinois law mandated equal filing dates and the same signature requirements for independent candidates as well as for new political party candidates.

the Illinois Election Code regarding the nominating petition minimum signature requirement for independent candidates and candidates of new political parties.

In *Socialist Workers Party, et al.* v. *Chicago Board of Election Commissioners, et al.*, No. 77 C 255, the Socialist Workers Party and two voters supporting candidates of the Socialist Workers Party sued the Chicago Board and its members, the City Clerk of Chicago, and members and employees of the appellant.

In *Gerald Rose, et al.* v. *John Hauly, et al.*, No. 77 C 326, the United States Labor Party, a candidate of the United States Labor Party, and two voters supporting the candidates of the United States Labor Party, sued the Chicago Board. At the request of the Chicago Board, the appellant, State Board of Elections intervened in this action.

B. *The Challenged Statutes*

The pertinent provisions of Chapter 46, Ill. Rev. Stat., §§ 10-2 and 10-3, require that nominating petitions for new political party candidates and independent candidates be signed by qualified voters equaling not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision voting as a unit for the election of officers to serve its respective territorial area.

Sections 10-2 and 10-3 further provide that where the 5% signature requirement is applied to new political party candidates and independent candidates running for statewide offices, such petitions shall be signed by not less than 25,000 qualified voters. Appellees argued that the application of the 5% signature requirement to independent and new political party candidates running for mayor of the City of Chicago in 1977, required them to obtain 35,947 signatures, while independent and new political party candidates for statewide offices only need 25,000 signatures. Consequently, §§ 10-2 and 10-3 allegedly deprived appellees of equal protection of the law.[3]

C. *Proceedings In The District Court*

Without an evidentiary hearing, on March 14, 1977, the District Court, in a consolidated opinion, held that a minimum signature requirement in excess of 25,000 signatures ". . . cannot be the least drastic means of accomplishing the state's goals and must be found to unduly impinge the constitutional rights of independents, new political parties and their adherents." (J.A.B., p. 26a) The trial court, in the same opinion, issued a permanent injunction against the Chicago Board requiring that the Chicago Board accept nominating petitions for candidates for offices serving less than the entire state containing a minimum of 25,000 signatures.

On March 17, 1977, the District Court signed an agreed order reflecting an agreement between the defendant-appellee, U.S. Labor Party and the Chicago Board, to reduce the signatures for independent and new political party candidates below the 5% minimum of 39,937 (25,000 by virture of the district court's March 14th order), to a new minimum of 20,000 signatures, and to extend the filing deadline from sixty-four days before the election (April 4,

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3. The appellees also challenged as unconstitutional, the statutory filing deadline for independent candidates and candidates of a new political party. The Trial Court did not rule on this question pending ". . . evidence adduced as to urgency and possible compelling state reason for setting the filing deadline. . . ." (J.A.B., p. 31a). However, since an agreed order between appellees extended the filing period beyond the statutory period, notwithstanding the objections of appellant, this issue was never adjudicated.

1977) to fifty days before the election (April 18, 1977). (J.A.D., p. 30a) Appellant was not advised of this agreed order and first learned of it at this hearing. Appellant vigorously objected at its entry.

On March 17, 1977, the appellant moved to vacate the March 14th order of permanent injunction on the grounds that it was issued without an evidentiary hearing. Appellant further argued that the decision in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), was binding on the District Court in that the U.S. Supreme Court specifically upheld the constitutionality of both the 5% minimum signature requirement in Illinois for independent and new political party candidates as well as the petition filing deadline of sixty-four days prior to election day.

On April 4, 1977, the appellant filed an Offer of Proof and another motion to vacate the order of permanent injunction set forth in the March 17th order, maintaining that it was incumbent upon the appellees, at the very least, to offer evidence that they could neither meet the 35,947 minimum signature requirement nor file their petitions by the statutory deadline. Appellants additionally attacked the March 17th order, asserting that the Chicago Board lacked authority to agree to an order to lower the minimum signature requirements or to extend the filing deadline on behalf of a particular political party contrary to state law.

On April 6, 1977, the District Court denied the motions of the State Board to vacate the orders entered on March 14, 1977 and March 17, 1977.

D. *Decision of the Court of Appeals*

On December 9, 1977, the Court of Appeals affirmed the March 14th permanent injunction and adopted the March 14, 1977 memorandum opinion of the District Court. On

the question of the issuance of a permanent injunction without an evidentiary hearing in violation of Fed. R. Civ. P. 65, the Court of Appeals dismissed the argument by stating, in part: "No purpose will have been served by holding an evidentiary hearing in this case. There were no actual disputes as to the grounds on which the injunction was ordered." (J.A.D. p. 4a)

On the question of the authority of a local election agency to reduce the signature requirement below the minimum set by the trial court and extend the filing deadline for one political party (and not for another political party because it did not meet the new standard agreed to between the local agency and the first political party), the Court of Appeals held this to be moot. The Court reasoned, in part, that the order applied only to the special mayoral election, which was over, and the issue, if repeated, could be reviewed at a later time by the Courts. (J.A.A., p. 6a)

I.

THE UNITED STATES COURT OF APPEALS IS REQUIRED TO FOLLOW THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *JACKSON* v. *OGILVIE*

A. The application of the doctrines of *law of the case* and *stare decisis*.

In *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S. Ct. 2247 (1971), which summarily affirmed a three-judge district court opinion, 325 F. Supp. 864 (N.D. Ill., 1971), this Court upheld the constitutionality of the statutes at issue in this litigation. Yet, the Court of Appeals wholly failed to examine the District Court's opinion in light of *Jackson* v. *Ogilvie, supra*, and the arguments of the appellant that the *Jackson* case was dispositive of all constitutional issues. Adopting the March 14, 1977 opinion of the District Court, the Court of Appeals uncritically deferred to the " . . . well-reasoned equal protection analysis" of the District Court. In so doing, the Court of Appeals ignored the decision of this Honorable Court in the *Jackson* case.

In upholding the constitutionality of the Illinois 5% signature requirement for independent candidates seeking the office of mayor of the City of Chicago, the three-judge *Jackson* court said, at page 868:

> "Jackson argues that the 5% minimum requirement of § 10-3 of the Illinois Election Code operates to limit his and plaintiffs Wilkinson's and Maclin's first amendment rights. He asserts that before they can act to advance his candidacy they must be joined by a group numbering approximately 58,000 qualified electors of the city. The question more pointedly is, can the state limit the availability of the ballot to

> only those candidates who evidence the support of 5% of the electorate? We think it can. In *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), the Court noted:
>
> > 'A state clearly has a substantial interest in administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption.'
>
> "While the 5% requirement is higher than the percentage required in a majority of other states (see, *Williams* v. *Rhodes, supra*, 393 U.S. 22 n. 9. 89 S. Ct. 5) nonetheless, we feel it is a reasonable limitation that serves a compelling interest.'

Under the doctrines of *stare decisis* and *law of the case*, the Court of Appeals was bound to follow the dictates of this Honorable Court.

The general doctrine of *stare decisis* is such that a court is not inexorably bound by its own precedents, but in the interest of uniformity of treatment of litigants, and of stability and certainty in the law, the court will follow the rule of law which has been established in earlier cases, unless clearly convinced that the legal rule was originally erroneous, or is no longer sound because of changed conditions, and that more good than harm would come by departing from precedent. See Moore, *Federal Practice* § 0.404[1], p. 401. Accord: *Helvering* v. *Griffith*, 318 U.S. 371 (1942); *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Wharton* v. *Hirsch*, 348 F. 2d 906 (1965).

The doctrine of *law of the case*, on the other hand, not only establishes a precedent for subsequent cases under the doctrine of *stare decisis*, but it establishes the law which other courts owing obedience to it must normally apply to the same issues in subsequent proceedings in that

case. See, Moore, *Federal Practice*, §0.404[1], p. 403. This doctrine is ordinarily invoked only where the case is the same. Appellant submits, however, that the doctrine should also be invoked where there is a substantial identity of *interests* of the parties in later cases; where there are no new evidentiary facts adduced; and, where the same relief is sought based upon the same issues. Under such circumstances the plaintiffs in the later case are "standing in the shoes" of the plaintiffs in the earlier case.

Res judicata is not applicable here since this doctrine operates after a question goes to judgment and is intended to prevent relitigation by making a decision binding upon the individual parties to a suit and is a limitation upon the court which is applicable in all cases where the parties and legal issues are the same. See, Moore's *Federal Practice*, § 0.404[1], at 404-405).

The doctrines of *stare decisis, law of the case* and *res judicata* have had many overlapping variations in application by the courts, blurring the distinctions between them. The following excerpt, however, succinctly states the relationships between these doctrines:

> "The doctrine called "law of the case' lies halfway between *stare decisis* and *res judicata*. It is stronger than *stare decisis*, for while *stare decisis* bids the courts follow the precedents after considering them . . ., the *law of the case* dispenses with the need of considering again what has been previously decided in the same suit." See *Lummus*, the "Law of the Case" in Massachusetts (1929) 9 Boston U.L. Rev. 225.

The Court of Appeals relied, in part, upon a distinction between special and general elections to uphold the issuance

of the permanent injunction.[4] The Court of Appeals did not acknowledge that: (1) the plaintiff-appellees had an identity of interests with the *Jackson* plaintiffs; (2) the same major defendant was involved; (3) the issues were the same; and, (4) no new facts were adduced. Yet, the injunction applies without distinction, in clear contradiction of the determination made by this Court in *Jackson*. The decision in the *Jackson* case was in fact dispositive of the issues raised in the instant case, and the Court of Appeals was bound to follow this Court's determination of those issues.

A summary affirmance by the Supreme Court is binding upon a United States District Court decision in a like matter, provided the issues litigated and decided are substantially the same. *Silverman* v. *Browning*, 414 F. Supp. 80 (D.C. Conn. 1976), *aff'd* 429 U.S. 876, 97 S. Ct. 228. See also, *North Carolina* v. *Duke Power Co.*, 425 F. Supp. 411 (D.C. N.C. 1976).

In *Antonioli* v. *Lehigh Coal and Navigation Co.*, 451 F. 2nd 1171 (3rd Cir. 1971) the elements required for invocation of the doctrine of *stare decisis* were shown to be in-

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4. Yet, plaintiff-appellees were never required to prove their allegation that the application of the Illinois law in the context of a special mayoral election was unconstitutional. No evidentiary hearing was ever held to determine the factual questions involved. Without determining at any stage of the proceedings that the instant case involved any significant factual differences from *Jackson*, the District Court issued a permanent injunction, applicable not only to the particular special mayoral election, but to all future elections. The Chicago Board is now permanently enjoined from requiring more than 25,000 signatures for candidates for offices serving less than the entire state.

tegral parts of the doctrine of the *law of the case*. In addition, it was held that if *res judicata* did not apply, the doctrine of *law of the case* did apply because, although the plaintiffs were different in the second case, there was an identity of interests of the plaintiffs against the same defendant since the same ultimate relief was sought based upon the same ultimate issues.

The *Antionoli* case then extended the doctrine of the *law of the case* to a second lawsuit holding, in effect, that such facts give rise to a mandatorily binding precedent as opposed to the persuasively binding precedent of *stare decisis*.

The major defendant in *Jackson*, as here, was the Chicago Board. This case and the *Jackson* case both involve a challenge to the Illinois Election Code's minimum signature requirements of 5% based upon the Equal Protection of the Laws Clause of the United States Constitution. The signature requirements in both cases exceeded 25,000. Both plaintiffs sought the same relief: a preliminary and permanent injunction against enforcement of the Illinois 5% signature requirements. Both sets of plaintiffs sought to be placed upon the ballot as candidates for mayor of the City of Chicago. Thus, the only distinctions between the *Jackson* case and the case presented by this appeal are distinctions in form, not substance: the actual name of the candidates seeking to be placed on the ballot and the designation of the election as a "General Election (or as a) Special General" election. Thus, the alleged distinctions are of no legal significance.

The district court attempted to distinguish the *Jackson* case from this appeal, writing:

> The court has great respect for the principle of *stare decisis* but is not bound by previous cases where different facts are alleged and where new and persuasive arguments are raised. (J.A.C. p. 362)

But that Court did not cite any different facts nor could it do so since no evidentiary hearing was held. Nor were any new arguments raised for it to rely on. It has been said that such a failure to follow an existing precedent reflects "the straining of the Court to find the evidence was different." *Union Light, Heat and Power Co.* v. *Blackwell's Administrator*, 291 S.W. 2d 539, 87 ALR 2d 264 (1956).

A special mayoral election is not different from a regularly scheduled mayoral election except that a candidate is elected to less than a full term. All viable parties and candidates had an equal statutory time period in which to gather and file the 5% minimum signatures. And, most important, the permanent injunction reducing the signature requirement was issued for *all elections*—not just for the June 7, 1977 special mayoral election in Chicago.

The distinctions in Illinois law between signature requirements for statewide and local independent candidates and new political party candidates were indeed presented to the U.S. Supreme Court in the *Jackson* case by the Attorney General of Illinois, in his argument against the constitutionality of §§ 10-2 and 10-3 of the Election Code. (See, in the Court's record, Defendant's Reply to Plaintiff's Memorandum In Opposition to Defendant's Motion to Dismiss, filed in the District Court on February 22, 1977). Appellant submits that there were no new persuasive arguments raised in the instant case that were not raised in *Jackson*.

The Court of Appeals herein erred in ignoring the *Jackson* Court determination of the issues before it. The holding in *Jackson* was there summarized as follows:

> "Thus, the court determines that the challenges to §§ 10-3, 10-4 and 10-6 of the Illinois Election Code, 46, Ill. Rev. Stat., §§ 10-3, 10-4 and 10-6 are without merit.

> The plaintiffs' motion for preliminary and permanent injunctive relief are denied and the cause is dismissed." 325 F. Supp., at 869.

The Court of Appeals decision was in direct contradiction of the precedent established by this Court, which the lower court was bound to follow. The judgment of the Court of Appeals should therefore be reversed, for under the facts and circumstances attendant to these proceedings, the Court of Appeals was required to follow and apply the principles of law set forth in *Jackson* under *law of the case* and *stare decises*.

B. The *Jackson* decision is not an anomaly.

The rationale of *Jackson* is supported by numerous other decisions of this Court. In *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970), it was stated:

> In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout history. 400 U.S., at 125-26.

Jenness v. *Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971)[5], upheld a Georgia statute requiring that candidates for elective office, not winning a political party primary, must obtain nominating signatures equal to 5% of the number of *registered* voters[6] at the last general election for that office;

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5. The District Court opinion in *Jackson* was affirmed by this Court on June 21, 1971, the same day this Court issued its opinion in *Jenness*.

6. *Jackson* upheld a requirement for signatures equal to 5% of the votes cast at the last general election, not 5% of all registered voters. Thus, the Illinois requirement upheld in *Jackson* is actually less restrictive than those upheld in *Jenness*. A percentage of those eligible to vote within a unit

American Party of Texas v. *White*, 415 U.S. 767, 94 S. Ct. 1296 (1974), upheld a Texas statute distinguishing between unfavorable nominating procedures for small political parties as opposed to favorable procedures for large political parties on the basis of voter support at the last election; *Rosario* v. *Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245 (1973), upheld a New York statute requiring a person to enroll in a political party at least 30 days prior to a general election so as to be eligible to vote in the party primary the following year; *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224 (1973), upheld a California statute restricting the electorate of a water storage district to landowners; *Burns* v. *Fortson*, 410 U.S. 686, 93 S. Ct. 1209 (1973) (per curiam), upheld a Georgia statute cutting off voter registration 50 days before a general election; and, *Marston* v. *Lewis*, 410 U.S. 679, 93 S. Ct. 1211 (1973), (per curiam), upheld an Arizona statute imposing a 50-day durational voter residency requirement.

II.

SUBSTANTIAL LEGAL QUESTIONS CANNOT BE MOOTED BY THE PASSAGE OF AN ELECTION

The Chicago Board violated Illinois election law by reducing minimum signature requirements below an objective statutory standard for ballot access (20,000 signatures

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of government represents a far greater numerical requirement than the percentage of those actually voting. While the required number of signatures for the special mayoral election was 35,947 (5% of votes cast at the previous election), the comparable percentage drawn from the pool of all registered voters would have been over 80,000 (5% of the *1,605,865* voters registered in Chicago the time of the special mayoral election.)

instead of 25,000 signatures as mandated by the District Court) and by arbitrarily extending the statutory filing deadline from 64 days to 50 days before the election. Specifically, this action was undertaken for the benefit of the U.S. Labor Party, a new local political party. Such reduction was effectuated by an agreed order over the objection of appellant that Chicago Board lacked any discretion whatsoever to set a different standard for ballot access.[7] This action not only contradicted the supervisory authority of appellant (Ill. Const., Art. III § 5, Ch. 46, Ill. Rev. Stat., § 1A-8(11)), it also violated state law. It is clear that Illinois election authorities are required to follow mandatory provisions of election laws. See, e.g., *Weston* v. *Markgraf*, 160 N.E. 215, (1928); *Waters* v. *Heaton*, 4 N.E. 2d 41 (1936); *Bergeson* v. *Mullinix*, 78 N.E. 2d 297 (1948).

By its private agreement with the U.S. Labor Party, the Chicago Board also violated the equal protection rights of other political parties who were unable to meet the U.S. Labor Parties' minimum requirement of 20,000 signatures. Once having ignored the statutory standard—and the judicial standard of 25,000 signatures—the Chicago Board had no grant of authority to impose any standard for ballot access for other political parties and independent candidates seeking the office of Mayor. Nor did the Chicago Board have any grant of authority to extend the filing date beyond the period allowed for the filing of independent and new political party candidates.[8]

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7. A similar order was entered in the companion case, *Socialist Workers Party et al.* (App. p. 73).

8. On April 14, 1977, the Libertarian Party sought to intervene in the *Socialist Workers Party* suit; on April 15, 1977, the district court denied leave to intervene. Such intervention was an effort to obtain "tailoring" of the minimum signature requirement to 18,000 in order to suit their needs. (App. p. 5, Docket Sheet for Socialist Workers Party case).

Notwithstanding this flagrant violation of a statutory directive, the Court of Appeals held the issue to be moot since the election had passed. The Court of Appeals noted at footnote 2: "We in no way suggest that appellants have failed to raise a substantial legal question on the issue. However, in light of our conclusion that it is moot, we will have to postpone considerations of the merits for another day." (J.A.A., p. 6a).

The law is clear that passage of an election does not render moot an issue still alive for future elections. In *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969), the Illinois Electoral Board (predecessor agency to appellant) refused to certify the plaintiffs who were independent candidates for the office of electors of the President and Vice President of the United States in the 1968 election, on the ground that although the plaintiffs' nomination petitions contained 25,000 signatures, as required by an Illinois statute, the petitions did not meet the requirement of the same statute that they include the signatures of 200 qualified voters from each of at least 50 of the 102 counties within the state. Challenging the constitutionality of this statutory provision, the candidates appealed to this Court from an adverse judgment of the three-judge District Court. Refusing to dismiss the appeal as moot because the 1968 election had been already held, this Court pointed out that the questions raised by the statute would not be answered and would remain and control future elections as long as Illinois maintained her present system as she had done since 1935. The problem was, therefore, "capable of repetition, yet evading review," (394 U.S. at 816) and the need for a resolution of the problem reflects a continuing controversy in the federal-state area. Cf. *Storer* v. *Brown*, 415 U.S. at 737, fn. 8.

In *Brown* v. *Chotc*, 411 U.S. 452, 420, 93 S. Ct. 1732 (1973), this Court held that the conduct of a primary election during litigation did not render moot the question raised by persons seeking to become candidates in the election, whether state election code provisions violated the Federal Constitution by requiring primary candidates to pay a filing fee, thereby barring indigents from seeking elective office, and from voting for the candidates of their choice.

In *Storer* v. *Brown*, 415 U.S. 724, 94 S. Ct. 1274 (1974), *reh. den.* 417 U.S. 926, 94 S. Ct. 2635, the constitutionality of certain California election laws governing access to the ballot was challenged by several independent candidates. The challenge was instituted prior to the 1972 election, but the appeal was not taken until after the election was conducted. Although it was contended that the plaintiffs would now be precluded effective relief, this Court, retaining jurisdiction, rested its decision on the ground that the issues raised would persist if the state statutes were applied in the same manner in future elections. A Court's failure to resolve the controversy on appeal would permit the controversy to be "capable of repetition, yet evading review." *Storer* v. *Brown*, 415 U.S. at 737, fn. 8. Accordingly, this Court reviewed the operation and application of the California statute in order to simplify or preclude future challenges and afford any future plaintiffs the opportunity to file timely cases so that adjudication of similar issues could be had before the election is held.

A challenge to a state statute involving elections cannot be left unresolved by the courts. This Court has noted that the likelihood of repetition of the controversy and the public interest in assuring appellate review are the key elements which require that the issues be resolved. See, e.g.

Southern Pacific Terminal Co. v. *Interstate Comm.*, 219 U.S. 498, 31 S. Ct. 279 (1911). The *Southern Pacific Terminal* doctrine identifies an "exception" to the judicial bar of mootness where the litigation involves actions by or against public officials, and the public interest is served in the enforcement of the legislative will and constitutional mandates.

In the case at bar, an administrative agency arbitrarily, in violation of state law and the supervisory authority of appellant, used, as an arbitrary standard for access to the ballot, the wishes of one political party. Another political party, the Libertarian Political Party, unable to meet the 20,000 signature standard, was rejected by the Chicago Board in their efforts to lower the signature requirement so that they, too, could obtain access to the ballot.

Such favoritism strikes at the very heart of a democratic system, especially in so crucial an area as elections.

Since the agreed order stands as a precedent for local election authorities to arbitrarily alter Illinois law, this Court should not permit the resolution of such issue to be held for "another day."

CONCLUSION

In view of the foregoing, Appellant respectfully prays that the decision of the Seventh Circuit Court of Appeals be reversed.

Respectfully submitted,

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